



## United States Department of the Interior

OFFICE OF SURFACE MINING  
RECLAMATION AND ENFORCEMENT  
Washington, D.C. 20240



IN REPLY REFER TO:

Ref: OSMRE-2018-00104

March 4, 2019

VIA Email

Mr. Jesse Coleman  
MuckRock News  
DEPT MR 52008  
411A Highland Ave  
Somerville, MA 02144-2516

Dear Mr. Coleman:

On April 2, 2018, you filed Freedom of Information Act (FOIA) request OSMRE-2018-00104, seeking:

**Pursuant to the Freedom of Information Act, I hereby request the following records:  
All emails, including attachments, to or from Mr. Davis that contain the following words:  
"West Virginia Coal Association"  
"WVCA"  
"Bostic"  
"Ramaco"  
"Berwind"**

**Please search your records from May, 1 2017 to July 31, 2017**

We are writing to provide you with our response to your request. Please find enclosed 35 files consisting of 491 pages being released to you in part.

Portions of these materials are being withheld under the following FOIA Exemptions:

**Pursuant to Exemption 4 of the FOIA (5 U.S.C. § 552(b)(4)), some commercial and financial information of a proprietary nature has been redacted:**

- **Confidential Business Information**

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Exemption 4 protects “trade secrets and commercial or financial information, obtained from a person, which is privileged or confidential.” This exemption is intended to protect both the interests of commercial entities that submit proprietary information to the Government and the interests of the Government in receiving continued access to it. It also applies to copyrighted materials. See, e.g., Hooker v. United States HHS, 887 F. Supp. 2d 40, 61 n.18 (D.D.C. 2012).

The withheld information is commercial information. It was provided to the Government as proprietary and would not customarily be provided to the public without cost. The company that supplied this information (the “submitter”) is considered a person because the term “person,” under the FOIA, includes a wide range of entities including corporations. Information is considered “confidential” if disclosure of it “is likely to cause substantial harm to the competitive position of the person from whom the information was obtained,” or harm the Government’s ability to obtain it. National Parks & Conservation Ass’n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). Public release of the withheld information could cause harm to the submitter’s competitive position in the marketplace. It would give an unfair advantage to other offerors competing against it in future competitive procurements for these and similar products and services. Additionally, it would be harmful to the Government’s ability to obtain such information.

Because the information withheld confidential business information that pertains to proposals submitted, we have concluded that the withheld information is “confidential commercial or financial information obtained from a person” and may be properly withheld, pursuant to Exemption 4 of the FOIA.

**Portions of the enclosed documents have been redacted pursuant to Exemption 5 of the FOIA (5 U.S.C. § 552 (b)(5)) under the following privileges:**

**Deliberative Process**

**Attorney Client Privilege**

**Confidential Commercial Information Privilege**

Exemption 5 allows an agency to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party... in litigation with the agency.” (5 U.S.C. § 552 (b)(5)). As such, Exemption 5 “exempt[s] those documents... normally privileged in the civil discovery context.” National Labor Relations Bd. v. Sears Roebuck & Co., 421 U.S. 132 (1975). The exemption incorporates the privileges that protect materials from discovery in litigation. These privileges include the deliberative process, confidential commercial information, attorney work-product, and attorney-client privilege. Id. at 149; see also Federal Open Market Committee v. Merrill, 443 U.S. 340, 363 (1979) (finding a confidential commercial information privilege under Exemption 5).

*Deliberative Process Privilege*

The deliberative process privilege “protect[s] the decisionmaking process of government agencies” and “encourage[s] the frank discussion of legal and policy issues” by ensuring that agencies are “not forced to operate in a fish bowl.” Mapother v. United States Dep’t of Justice, 3 F.3d 1533, 1537 (D.C. Cir. 1993) (citing Wolfe v. United States Dep’t of Health & Human Services, 839 F.2d 768,

773 (D.C. Cir. 1988) (en banc)). Three policy purposes have been advanced by the courts as the bases for this privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. See e.g., Russell v. United States Dep't of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982); Coastal States Gas Corp. v. United States Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

The deliberative process privilege protects materials that are both predecisional and deliberative. Mapother, 3 F.3d at 1537; Access Reports v. United States Dep't of Justice, 926 F.2d 1192, 1195 (D.C. Cir. 1991); Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). A "predecisional" document is one "prepared in order to assist an agency decisionmaker in arriving at his decision," and may include "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." Maricopa Audubon Society v. United States Forest Service, 108 F.3d 1089, 1093 (9th Cir. 1997). A predecisional document is part of the "deliberative process" if "the disclosure of the materials would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." Id.

Those portions of the documents that have been withheld pursuant to the deliberative process privilege of Exemption 5 reflect predecisional and deliberative discussions, including drafts, opinions, and recommendations, among employees of the Department of the Interior. Factual information that is not inextricably intertwined with deliberative information has been released. Public dissemination of the information withheld would have a chilling effect on the agency's deliberative processes and expose the agency's decision-making process in such a way as to discourage candid discussion within the agency and could lead to public confusion, either or both of which could undermine its ability to perform its mandated functions.

#### *Attorney-Client Privilege*

The attorney-client privilege protects "confidential communications between an attorney and his/her client relating to a legal matter for which the client has sought professional advice." Mead Data Cent., Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 252 (D.C. Cir. 1977). The attorney-client privilege is not limited to the context of litigation. See id. at 252-53. Moreover, although it fundamentally applies to confidential facts divulged by a client to his/her attorney, this privilege also encompasses any opinions given by an attorney to his/her client based upon, and thus reflecting, those facts, as well as communications between attorneys that reflect confidential client-supplied information. See id., McErlean v. United States Dep't of Justice, No. 97-7831, 1999 WL 791680, at \*7 (S.D.N.Y. Sept. 30, 1999).

The portions of these documents that have been withheld pursuant to the attorney-client privilege of Exemption 5 constitute confidential communications between agency attorneys and agency clients, or Federal attorneys and agency clients, for legal matters, informal review decision for which the clients sought professional legal advice. These portions of the documents have been held confidential by the agency. Public dissemination of them would most certainly have a chilling effect on communications between agency clients and attorneys.

*Confidential Commercial Information Privilege*

When the government enters the marketplace as an ordinary commercial buyer or seller, the government information is protected from competitive disadvantage under Exemption 5. Government Land Bank v. General Services Administration, 671 F.2d 663, 665 (1st Cir. 1982). Exemption 5 prevails “where the document contains ‘sensitive information not otherwise available,’ and disclosure would significantly harm the government’s commercial interest.” Id. at 666; see also Federal Open Market Committee v. Merrill, 443 U.S. 340, 363 (1979).

Pursuant to the confidential commercial information privilege, financial government information has been withheld under Exemption 5. The financial government information constitutes “intra-agency” documents because they are only shared with members of the Department for the purpose of conducting official government business. Moreover, the financial government information qualify as “confidential commercial information” because the government entered the marketplace as an ordinary commercial buyer of financial information.

Because the release of the financial government information would significantly harm the government’s financial interest by publicizing sensitive information, the Office of Surface Mining Reclamation and Enforcement is withholding the information in accordance with Exemption 5 of the FOIA.

**Portions of the enclosed documents have been redacted pursuant to Exemption 6 of the FOIA (5 U.S.C. § 552(b)(6)) because they fit certain categories of information:**

*Unsuccessful applicant’s information*  
*Home address*  
*Home phone numbers*  
*Non-governmental salary information*

Exemption 6 allows an agency to withhold “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” The courts have held that the phrase “similar files” involves all information that applies to a particular person. Hertzberg v. Veneman, 273 F. Supp. 2d 67, 85 n.11 (D.D.C. 2003); Sherman v. United States Dep’t of the Army, 244 F.3d 357, 361 (5th Cir. 2001).

When disclosure of information about a particular individual is requested, the agency must determine whether release of the information would constitute a clearly “unwarranted” invasion of the individual’s privacy. NARA v. Favish, 541 U.S. 157, 171 (2004).

To make this determination, we are required to perform a “balancing test.” This means that we must weigh the individual’s right to privacy against the public’s right to disclosure.

- (1) First, we must determine whether the individual has a discernable privacy interest in the information that has been requested.
- (2) Next, we must determine whether release of this information would serve “the public interest generally” (i.e., would “shed light on the performance of the agency’s statutory duties”).

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(3) Finally, we must determine whether the public interest in disclosure is greater than the privacy interest of the individual in withholding.

The information that we are withholding consists of personal information about unsuccessful job applicants, personal home address, personal home telephone numbers, non-governmental salary information.

The Office of Surface Mining Reclamation and Enforcement (OSMRE) have determined that the individuals to whom this information pertains have a substantial privacy interest in it.

Additionally, we have determined that the disclosure of this information would shed little or no light on the performance of the agency's statutory duties and that, on balance, the public interest to be served by its disclosure does not outweigh the privacy interest of the individuals in question, in withholding it. Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989). In short, we have determined that release of the information that we have withheld would constitute a clearly unwarranted invasion of the privacy of these individuals, and that it therefore may be withheld, pursuant to Exemption 6.

Emily Morris, Attorney Advisor with the Office of the Solicitor, was consulted in reaching this decision. Dele Awoniyi, Office of Surface Mining Reclamation and Enforcement FOIA Officer, is responsible for making this decision.

*DOI FOIA/Privacy Act Appeals Office Contact Information*

Department of the Interior  
Office of the Solicitor  
1849 C Street, N.W.  
MS-6556 MIB  
Washington, DC 20240  
Attn: FOIA/Privacy Act Appeals Office

Telephone: (202) 208-5339

Fax: (202) 208-6677

Email: [FOIA.Appeals@sol.doi.gov](mailto:FOIA.Appeals@sol.doi.gov)

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of FOIA. See [5 U.S.C. § 552\(c\)](#). This response is limited to those records that are subject to the requirements of FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

**Office of Government Information Services Meditation**

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a

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non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road - OGIS  
College Park, MD 20740-6001  
E-mail: [ogis@nara.gov](mailto:ogis@nara.gov)  
Web: <https://ogis.archives.gov>  
Telephone: 202-741-5770  
Fax: 202-741-5769  
Toll-free: 1-877-684-6448

Please note that using OGIS services does not affect the timing of filing an appeal with the Department's FOIA & Privacy Act Appeals Officer.

If you have any questions regarding any issues discussed in this letter, you may contact me by phone at 202-208-5840, by fax at 202-501-0549, by e-mail at [foia@osmre.gov](mailto:foia@osmre.gov) or by mail at Office of Surface Mining Reclamation and Enforcement, 1849 C Street, N.W., MS 1200W-MIB, Washington, D.C. 20240.

Sincerely,

Dele Awoniyi  
Office of Surface Mining Reclamation  
and Enforcement  
FOIA Officer